FILE COPY

Office - Supreme Court, U. S.
OCT 25 1944
CHARLES ELMORE CROPLEY.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Nos. 57, 58 and 59

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

TRIBUNE COMPANY AND ROBERT RUTHERFORD McCORMICK,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF CHICAGO TIMES, INC., AMICUS CURIAE.

MATTHIAS CONCANNON,
WALTER V. SCHAEFER,
Chicago, Illinois,
Attorneys for Chicago Times, Inc., Amicus Curiae.

PRINTED BY CHICAGO LAW PRINTING CO.

SUBJECT INDEX.

	PAGE
STATEMENT	2
SUMMARY OF ARGUMENT	2-5
ARGUMENT:	
I. Freedom of the press is abridged in this case	5-22
(a) The right of the producer of news copy to determine whether to publish his copy or not—his privilege of silence with respect to his copy—and, if his decision be to publish, his right to determine the circumstances of publication, are freedoms protected by the First Amendment	5-13
(b) Freedom of the press protected by the First Amendment is not ended until the intelligence of the producer of the copy is conveyed to those whom it was intended to reach	13-16
(c) The enjoyment of Constitutional freedoms is not dependent upon the instrumentality used. The instrumentality used is clothed with the same freedoms as the one employing it	16-20
(d) Freedom of the press and of religion are similarly protected by the First Amendment. One is as immune from Governmental interference as the other	20-22
II. The Commerce Clause does not justify the abridgment of freedom of the press here involved	22-30
(a) The history of the relationship between the Commerce Clause and the First Amendment	22-25

PAGE

(b) Under the opinions of this Court, legislation enacted by Congress, including legislation enacted under the Commerce Clause, must yield to the provisions of the First Amendment 25-26

(c) A commercial press is protected by the First Amendment 27-28

(d) Congressional objectives and methods in regulating commerce under the Commerce Clause are transitory. They afford no basis for expanding or contracting the area of the Constitutional freedom protected by the First Amendment 28-30

III. Neither Congress nor the Courts may substitute their judgment concerning the method by which the public interest is best served for the provisions of the First Amendment on that subject. The method provided by the First Amendment is freedom from governmental authority. The method urged by the Government and adopted by the court below is compulsory sharing of copy, which is incompatible with that freedom 31-44

(a) Government has always asserted that the restraints which it sought to impose upon the press have been in the public interest 31-32

(b) Governmental endeavor to achieve unity of opinion by regulation of the press is not a legitimate objective. It is opposed to the First Amendment 32-35

(c) The view of the court below that the public interest in "full illumination" through newspapers will be best served by regulation of membership in AP is as obnoxious to the First Amendment as the other reasons which have been advanced in the past to achieve abridgment of the freedom of the press 35-40

PAGE

(d) The events of the day constitute the news. News copy is an unpublished story of those events. One is the event, the other the story. Freedom of the press does not require unhampered access to news copy. Such access to the news copy of another is opposed to the First Amendment 40-44

IV. Compulsory sharing of news copy, the equivalent of compulsory utterance, is not warranted in this case under any rule announced by this Court limiting the freedoms protected by the First Amendment 44-49

Conclusion 49

Table of Cases Cited.

A. F. of L. v. Swing, 312 U.S. 321 28

Associated Press v. Labor Board, 301 U.S. 103 ..... 17, 26

Atchison, T. & S. F. Ry. Co. v. Brown, 80 Kans. 312, 102 Pac. 459 11

Board of Education v. Barnette, 319 U.S. 624 ..... 8, 10, 11, 34, 35, 44, 48

Bridges v. California, 314 U.S. 252 ..... 25, 46

Cafeteria Employees Union v. Angelos, 320 U.S. 293 27, 32

Carpenters Union v. Ritter's Cafe, 315 U.S. 722 48

Chicago R. I. & Pac. Ry. v. Perry, 259 U.S. 548 11

Dickinson v. Perry, 75 Okla. 25, 181 Pac. 504 (1919) 11

Ex parte Harrison, 212 Mo. 88, 110 S.W. 709 10

Gibbons v. Ogden, 9 Wheat. 1, 202 23

Gitlow v. New York, 268 U.S. 652 ..... 11, 45

Graves v. New York, 306 U.S. 466 19

Grosjean v. American Press Co., 297 U.S. 233 30

Hague v. C. I. O., 307 U.S. 496 ..... 32, 46

Harrison, Ex parte, 212 Mo. 88, 110 S.W. 709 10

TABLE OF CASES (continued).

	PAGE
Jones v. Opelika, 316 U.S. 584	25
Lithographic Co. v. Sarony, 111 U.S. 53	8
Lovell v. City of Griffin, 303 U.S. 444	32
Martin v. Struthers, 319 U.S. 141	32
McCulloch v. Maryland, 4 Wheat. 316	18, 19
Millar v. Taylor, 4 Burrow 2303, 98 Eng. Reports, 201 (1769)	7, 8
Minersville School District v. Gobitis, 310 U.S. 586	9, 10, 32, 46
Murdock v. Pennsylvania, 319 U.S. 105	9, 27
National Broadcasting Co. v. United States, 319 U.S. 190	26, 29
Near v. Minnesota, 283 U.S. 697	30, 32, 39
New York Central Securities Corporation v. United States, 287 U.S. 12	28
Osborn v. United States Bank, 9 Wheat. 738	19
Pierce v. Society of Sisters, 268 U.S. 510	46
Prince v. Commonwealth of Massachusetts, 321 U.S. 158	13
Prudential Insurance Co. v. Cheek, 259 U.S. 530	11
Schenck v. United States, 249 U.S. 47 (1919)	11
Schneider v. State, 308 U.S. 147	45, 46
Stafford v. Wallace, 258 U.S. 495	28-29
St. Louis Southwestern Ry. Co. v. Griffin, 106 Tex. 477, 171 S.W. 703	11
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381	29
Swift and Company v. United States, 196 U.S. 375	28
Thornhill v. Alabama, 310 U.S. 88	27, 32
United States v. Associated Press, 52 F. Supp. 362	6, 16, 36, 42

PAGE

Table of Cases (Continued).

Wallace v. Georgia C. & N. Rwy. Co., 94 Ga. 732, 22 S.E. 579 11

Whitney v. California, 274 U.S. 357 36

Table of Constitution and Text Citations.

Address by Delegates of the First Continental Congress to the Inhabitants of Quebec, Journals of Continental Congress, Vol. 1, pp. 40, 42 36

American State Papers, Class I, Foreign Relations, Vol. II, 196 38

Annals of Congress, Vol. I, pp. 765-766 12

"Areopagitica", John Milton 9, 13, 31, 39

Boutell, Life of Roger Sherman, p. 173 24

Constitution, Article I, Sec. 8, cl. 8 43

Dictionary of National Biography (1922), Vol. XV, 70-72, Life of Thomas Paine 27

Elliot's Debates, Vol. IV, 576, 577; Vol. II, 449; Vol. III, 656 ..... 13, 14, 24

Euripides, Works of,—Oxford Text (1908), "Suppliants", lines 438-441 12

Jeffersonian Cyclopedia (1900), p. 718, Par. 6933; p. 977 (Kentucky Resolutions (1798)); p. 742, Par. 7220; p. 188, Pars. 1649, 1651; p. 636, Par. 5944 ..... 12, 13, 20, 24, 37

Journals of the Continental Congress, Vol. I, pp. 42, 40 ..... 12, 36

Lecky, England in the 18th Century, III, p. 302 23

Life of Thomas Paine, Vol. XV Dictionary of National Biography, (1922) pp. 70-72 27

Life of Roger Sherman, Boutell, p. 173 24

Life of Washington, II, Marshall, p. 105 23

Marshall, Life of Washington, II, p. 105 23

PAGE

TABLE OF CONSTITUTION AND TEXT CITATIONS.

Milton, John, "Areopagitica" 9, 13, 31, 39

McMaster & Stone, Pennsylvania and the Federal Constitution, pp. 616, 143, 144 24

Order of Parliament, June 14, 1643; English Reprints "Areopagitica", Alex. Murray & Son, London (1869), p. 25 9

Proclamation of King Charles II 38

Richardson, Messages and Papers of the Presidents (1789-1817), I, p. 53 24

"Suppliants", Works of Euripides, Oxford Text (1908) Ed. Gilbert Murray, Vol. II; Harvard Classics (1909), Vol. 3 12

Writings of Washington, Vol. 3, pp. 223, 224 23

Writings of Washington, Vol. 29, p. 336 at 340; 395 at 396; 409 at 411; 464 at 465-6; 475 at 478-9 24

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Nos. 57, 58 and 59.

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

TRIBUNE COMPANY AND ROBERT RUTHERFORD McCORMICK,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF CHICAGO TIMES, INC., AMICUS CURIAE.

STATEMENT.

This brief is submitted on behalf of Chicago Times, Inc., an Illinois corporation, owner of the Chicago Times, an afternoon daily and a Sunday newspaper, published in the City of Chicago. Chicago Times, Inc., is a member of The Associated Press.* It is not specifically named as a defendant in the case, but it is made a defendant by representation. (Complaint, Par. 40; R. 7.)

In the court below, Richard J. Finnegan, editor of the Chicago Times, filed a statement concerning the application of the First Amendment to this case. This brief is confined to that question.

SUMMARY OF ARGUMENT.

I. The First Amendment question in this case is whether Government may compel a newspaper and AP, one of its instrumentalities, to share unpublished news copy with other newspapers. Government seeks to achieve such compulsion here by prescribing terms for the selection of additional associates in AP, the cooperative news gathering instrumentality, of which the newspaper is a member.

Compulsory sharing of unpublished copy is the equivalent of compulsory publication. It allows another to determine whether publication shall be made and the circumstances of publication by him, thus leaving the producer without freedom of choice on these matters.

The First Amendment protects the freedom of the press. Freedom and compulsion are incompatible terms.

---

* For convenience The Associated Press will be hereinafter referred to as AP, and the functions which AP performs for its members in gathering, editing and distributing the news will sometimes be termed a "news service".

Freedom implies absence of compulsion, choice as to whether to publish or not, and if to publish, when and where and to whom. It implies the right of silence with respect to one's own unpublished copy; the right to refuse to share it with others before it is published. All of these are personal freedoms, included in the freedom of the press protected by the First Amendment, quite apart from any protection which the law may give to property or quasi-property rights in news copy.

The freedom envisaged by the First Amendment as to news copy is not ended when the copy is produced. It is not ended until the message of the producer is conveyed to the public through those sources which the producer intended.

Freedom of the press includes freedom to choose the instrumentalities which will be employed in the publication and distribution of a newspaper and freedom to choose those with whom one will associate in those activities, without subjecting one to Governmental interference or regulation by reason of the instrumentality employed. The Constitutional freedom includes the newspaper, and the instrumentalities and agencies, individual or corporate, which it uses in enjoying its Constitutional freedom.

It is of no importance that AP is a corporate entity separate from its members, and that the copy involved technically is its copy rather than that of its members. AP is merely an instrumentality of its members to furnish a news service to them.

There is no more authority on the part of Government to control, regulate or interfere with membership and the privileges which membership affords in the case of AP than in the case of a religious corporation.

These matters are discussed under Point I of the Argument, at pages 5 to 22 of this Brief.

II. The Commerce Clause of the Constitution does not justify any abridgment of the freedom of the press. Laws regulating commerce enjoy no immunity from the prohibitions of the First Amendment. The contrary view would allow the area of constitutional freedom afforded by the First Amendment to expand or contract with the transitory objectives of legislation passed by Congress under the Commerce Clause. There is nothing novel in a commercial press. Such a press was known to the framers of the Constitution, and it was such a press that they intended to protect by the First Amendment.

The fear of abridgment of the personal freedoms, including the freedom of the press, through the exercise of Federal power under the Commerce Clause, led to the adoption of the First Amendment. These arguments are presented under Point II, at pages 22 to 30 of this Brief.

III. We concede that there is a vital public interest in the dissemination of news. However, the public interest in that subject was the same at the time the First Amendment was adopted as it is today. The framers of that Amendment sought the best means of protecting that public interest, and their judgment was expressed in the Amendment. Freedom of the press from governmental authority was the method chosen by them to serve the public interest. But the Government urged, and the court below adopted the view, that the public interest would be better served by the compulsory sharing of unpublished news copy. This necessarily involves Governmental control, interference or regulation with respect to the terms upon which it shall be shared and the circumstances of its sharing. A new judicial appraisal of the public interest in a free press thus supplants the appraisal made by the framers of the First Amendment.

The objective of "full illumination" of the public, if it is to be achieved by regulation of Government, is as obnoxious to the First Amendment as were the objectives of "accurate", "safe" and "wholesome" illumination, which in the past have been asserted by Government in support of regulation, control or licensing of the press. Our views on these questions are presented under Point III of the Argument, at pages 31 to 44 of this Brief.

IV. Compulsory sharing of news copy is not warranted in this case under the rule announced in the "clear and present danger" cases or under any other rule announced by this Court limiting the freedoms protected by the First Amendment. This question will be considered in Point IV of the Argument, at pages 44 to 49 of this Brief.

I.

Freedom of the press is abridged in this case.

(a) *The right of the producer of news copy to determine whether to publish his copy or not—his privilege of silence with respect to his copy—and, if his decision be to publish, his right to determine the circumstances of publication, are freedoms protected by the First Amendment.*

The Constitutional question in this case is whether Government may compel a newspaper and AP, one of its instrumentalities, to share unpublished news copy with other newspapers. Government seeks to achieve such compulsion here by prescribing terms for the selection of additional associates in AP, the cooperative news gathering instrumentality, of which the newspaper is a member.*

* This brief is written upon the theory that the Constitutional freedoms of the Chicago Times, Inc., publisher of the Chicago Daily Times, are sought to be invaded, as AP is a mere instrumentality of its member newspapers. We shall discuss that question at pages 16 to 20 of this brief.

Here the Government contends that by the general language of the anti-trust laws Congress has authorized the courts to prescribe the terms upon which newspapers may associate in a cooperative effort to assemble the daily news.

The majority opinion in the court below, concerning the application of the First Amendment to the case, said (R. 2600, 52 F. Supp. 374): "The effect of our judgment will be, not to restrict AP members as to what they shall print, but only to compel them to make their dispatches accessible to others." The court's conception was that one's freedom was not invaded "so long as he remains unfettered in his own selection of what to publish. All that we do is to prevent him from keeping that advantage for himself." (R. 2600, 52 F. Supp. 374.)

The First Amendment protects the freedom of the press against restraints by Government. Freedom and compulsion are incompatible terms. Freedom implies absence of compulsion, choice as to whether to publish or not, and if to publish, when and where and to whom. It involves more than the mere right to remain unfettered in the selection of what one will publish. It envisages freedom to be silent as well as to publish. Utterance or publication which is compelled is not free. One who writes does not enjoy freedom, if as a condition to publishing what he writes, there is attached an obligation to share the product of his intelligence and industry with others, without his consent, or upon terms imposed by others. Such an obligation to share is the equivalent of compulsory utterance of the writer's copy.

The producer's freedom of choice as to whether to publish or not, and if to publish, when and where and to whom are personal freedoms, included in the freedom of the press protected by the First Amendment, quite apart from any protection which the law may give to property or quasi-property rights in news copy.

It will be helpful to define the term "copy". Written copy is but recorded thought yet unpublished. It is an ancient term in the art of printing.

Lord Mansfield said:

> "I use the word 'copy' in the technical sense in which that name or term has been used for ages, to signify an incorporeal right to the sole printing and publishing of somewhat intellectual, communicated by letters." (*Millar* v. *Taylor*, 4 Burrow 2303, 2396, '98 Eng. Reports 201, 251 (1769).)

Lord Mansfield, referring to the common law rights of an author of copy before publication, said in the same opinion:

> "It has all along been expressly admitted, 'that, by the common law, an author is intitled to the copy of his own work until it has been once printed and published by his authority;' • • •
>
> "From what source, then, is the common law drawn, which is admitted to be so clear, in respect of the copy before publication?
>
> "From this argument—because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect." (4 Burr. 2396, 2398, 98 Eng. Rep. 251, 252)

Mr. Justice Yates in the same case said:

> "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or

commit them only to the sight of his friends." (4 Burr. 2303, 2379.)*

As written copy is but recorded thought yet unpublished, and as Government may not command one to speak his thoughts consistently with the First Amendment (*Board of Education* v. *Barnette*, 319 U. S. 624, 632-633, 641), it may not command one to publish or share his unpublished copy.

To speak and publish freely and to enjoy the substance of the Constitutional freedoms upon those subjects, it is essential that one have the right to select the time, the place and the circumstances of utterance or publication without governmental interference. One does not enjoy those freedoms when Government may dictate, interfere with or regulate the circumstances of utterance or publication. It is no answer to one who wishes to exercise his Constitutional freedom to publish his copy at a time and place and under circumstances which he may choose, for Government to say he may publish what he will, provided he share his copy with others for publication by them if they wish, under circumstances of their and not his choice. One so interfered with does not enjoy freedom. He has been compelled to pay a price for enjoying the freedom to publish. The price exacted has been the sharing of his copy with others. The exaction of a non-discriminatory license fee—a price for exercising a Constitutional free-

* The judgment of the Court of the King's Bench in *Millar* v. *Taylor* was reversed in the House of Lords (4 Burr. 2408, 98 Eng. Rep. 257 (1774)), but upon questions not involving either the definition of the word "copy" as stated in Lord Mansfield's opinion or the common law respecting an author's right to determine whether to publish or not. Concerning this case, this Court said that it was one which "had attracted much attention" and which probably was familiar to the framers of the Constitution. (*Lithographic Co.* v. *Sarony*, 111 U. S. 53, 58.)

dom—has been held to be a restraint upon liberty of publication. (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 113, 115.)

It was against an Order of Parliament regulating printing of copy and requiring censorship before publication, but which retained to the author the right of publication of the copy as censored,* that the classic "Areopagitica" of Milton was immediately aimed. In making his great plea for the liberty of unlicensed printing, Milton made the remark since often quoted: "* * * the just retaining of each man his severall copy, which God forbid should be gainsaid. * * *"† This Order of Parliament although preserving the rights of the author in copy, compelled him to pay a price for the liberty of publishing, i. e., deletion of the censored portion of his copy. Here the price for liberty of publication is the sharing of the copy with others.

In our judicial history the First Amendment most frequently has been called upon to stay the power of government when that power was asserted to suppress or to punish an utterance either because of the allegedly obnoxious character of the substance of the utterance or because the time, place or other circumstances of the utterance were deemed by Government sufficient justification for condemnation. In these cases the role of government has been one of prohibition or censorship; it is only recently that this Court in applying the First Amendment has stayed the assertion of the power of government to compel an utterance.

In the dissenting opinion of Mr. Justice Stone in *Minersville School District* v. *Gobitis*, 310 U. S. 586, 601, and in

*(Order of Parliament, June 14, 1643; English Reprints "Areopagitica", Alex. Murray & Son, London (1869) p. 25.)

†Milton's Areopagitica—Hales—p. 58.

the opinion of the court in *Board of Education* v. *Barnette*, 319 U. S. 624, which overruled the *Gobitis* case, the power of the First Amendment to restrain the effort of government to compel utterance was recognized.

In the *Gobitis* case, Mr. Justice Stone, referring to the intention of the framers of the Constitution, said (310 U. S. at 605):

> "I cannot conceive that in prescribing, as limitations upon the powers of government, the freedom of mind and spirit secured by the explicit guarantees of freedom of speech and religion, they intended or rightly could have left any latitude for a legislative judgment that the compulsory expression of belief which violates religious convictions would better serve the public interest than their protection."

In the *Barnette* case, the Court said (319 U. S. at 633-634):

> "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. • • • To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."

That freedom of speech protects against compulsory utterance was determined in *Ex parte Harrison*, 212 Mo. 88, 94, 110 S. W. 709, 711 (1908). There a statute punished the publication of reports by "Civic Leagues and like associations" upon the qualifications of candidates for public office, unless the report contained information specified in the statute. The Court held that the legis-

lation trespassed upon the Constitutional guaranty of freedom of speech. The Court said: "The right to speak freely is necessarily attended by the correlative right to remain silent."

This view of the scope of the Constitutional right to speak freely has been unequivocally recognized by several state courts. (*Wallace* v. *Georgia C. & N. Rwy. Co.*, 94 Ga. 732, 22 S. E. 579; *Atchison, T. & S. F. Ry. Co.* v. *Brown*, 80 Kans., 312, 315, 102 Pac. 459, 460; *St. Louis Southwestern Ry. Co.* v. *Griffin*, 106 Tex., 477, 485, 171 S. W. 703, 705.)* The three last cited cases involved "service-letter" statutes requiring corporations to furnish their employees with a written statement as to the character of each employee's service and the grounds for discharge upon the termination of employment. What these cases expressed is implicit in this court's observation, "It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." (*Board of Education* v. *Barnette*, 319 U. S. 624, at 633.)

---

*A few years later, the Oklahoma court considered a similar statute in *Dickinson* v. *Perry*, 75 Okla. 25, 34, 181 Pac. 504, 512 (1919). Meanwhile, the clear and present danger test in First Amendment cases had been announced in *Schenck* v. *U. S.*, 249 U. S. 47, 52 (1919). The Oklahoma court applied that test to the statute before it, and found the statute valid.

The Oklahoma case, and a similar one from Missouri, came before this Court in *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, and *Chicago, R. I. & Pac. Ry.* v. *Perry*, 259 U. S. 548. In these cases the scope of Constitutional freedom of speech and press was not determined by this Court. Under the decisions then controlling, no Federal Constitutional question was presented by State legislation concerning freedom of speech and press. It was not until *Gitlow* v. *New York*, 268 U. S. 652, in 1925, that the "liberty" of the Fourteenth Amendment was held to protect freedom of speech and press against abridgment by the states.

For more than 2,000 years men have dreamed of a just state in which the citizen could utter or be silent as he pleased. For Euripides wrote (413 B. C.):

> "This is true liberty when free born men
> Having to advise the public may speak free,
> Which he who can, and will, deserv's high praise,
> Who neither can nor will, may hold his peace;
> What can be juster in a State than this?" *

The press is an instrument of the people for corrective utterance against their public servants.† In the Congressional discussion of the First Amendment, Madison said that the press was one of the ways in which the people communicate their will to their representatives.‡ And Jefferson said that the press was a "formidable censor of the public functionaries, by arraigning them at the tribunal of public opinion, (it) produces reform peaceably, which must otherwise be done by revolution." **

To be effective for the purpose intended, choice of the time, place and circumstances of publication must be in the one producing the copy. That choice is essential to the enjoyment of freedom of publication. It could not have been intended by the framers of the Amendment that Government, which, as Jefferson said, may be censored by the press, should have the power to regulate the time,

---

*(From "Suppliants", Works of Euripides, Oxford Text (1908) Ed. Gilbert Murray, Vol. II, lines 438-441. The foregoing quotation will be found in Harvard Classics (1909), Vol. 3, 193.)

† In 1774 the First Continental Congress resolved that the liberty of the press was important because it was a method "whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs." (Journals of the Continental Congress, Vol. I, p. 42.)

‡ Annals of Congress, Vol. I, pp. 765-766.

**Jeffersonian Cyclopedia (1900), p. 718, Par. 6933.

the place or the circumstances of publication of the copy of the press. The effectiveness of the message, in many instances, will depend upon the time and place of its publication and the attending circumstances. Milton, in his *Areopagitica*, expressed this in the statement: "There is no book that is acceptable unlesse at certain seasons * * * *" (*Works of John Milton*, Bickers & Son, 1867, Vol. IV, p. 421).

(b) *Freedom of the press protected by the First Amendment is not ended until the intelligence of the producer of the copy is conveyed to those whom it was intended to reach.*

The freedoms protected by the First Amendment embrace utterance in diverse forms. We pray, we speak, we write and print, we assemble and we petition. Each form of utterance has equal protection, equal immunity, equal sanctuary.*

---

* *Prince* v. *Commonwealth of Massachusetts*, 321 U. S. 158, 164.

Jefferson, Kentucky Resolutions (1798) (Jeffersonian Cyclopedia (1900), p. 977).—"* * * one of the amendments to the Constitution * * * expressly declares, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press'; thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech and of the press; insomuch, that whatever violated either throws down the sanctuary which covers the others."

Madison said on this subject that it was "the understanding of the Convention, that the liberty of conscience and freedom of the press were equally and completely exempted from all authority whatever of the United States." And to extend public confidence, the First Amendment was adopted "Under an anxiety to guard more effectually these rights against every possible danger." (Elliot's Debates, Vol. IV, p. 576.)

Utterance is not a half measure. The prayer must reach the deity; the thinking expressed by spoken or printed word must go freely to the particular mind intended to be addressed without hindrance by any person or authority. If there is any interposition of restraint between the brain in which the thought originates and the brain to which the thought is directed as intelligence, freedom of utterance is abridged.

Utterance by speech first delivers the thought to the mechanism of the mouth. There is utterance by speech when sound, formed into words by that mechanism, leaves the portal of the speaker's lips and communicates the message of thought to the ears of the intended listener.

Utterance by the press first delivers the thought to the function of the hand. By the hand, thought is put into letters or symbols, usually on paper. This is the "copy" stage. From copy the thought is set into type. The type is assembled on the press. The press imparts impressions of inked type upon sheets of paper. There is utterance by the press only when the thought, appearing in the form of the printed word, leaves the portal of the press room

---

Madison also said (Elliot s Debates, Vol. IV, p. 577):

> "First, Both of these rights, the liberty of conscience, and of the press, rest equally on the original ground of not being delegated by the Constitution, and consequently withheld from the government. Any construction, therefore, that would attack this original security for the one, must have the like effect on the other.
>
> "Secondly, They are both equally secured by the supplement to the Constitution, being both included in the same amendment, made at the same time and by the same authority. Any construction or argument, then, which would turn the amendment into a grant or acknowledgment of power, with respect to the press, might be equally applied to the freedom of religion."

for distribution to that part of the public which the publisher intends to inform. The press communicates the message of thought to the eyes of those for whom it prints. So that from the stage at which there is a will in one mind to transmit a thought to another mind to the stage at which that same thought is registered in the mind intended to receive it, there must be a process of communication of thought, without restraint or interference by Government, if one is to enjoy the freedom of the press contemplated by the First Amendment. Thinking, writing (copy) and publishing are indispensable elements in this process of communication.

The freedom of the press is not exhausted before publication and distribution. Until then the producer of news copy, and he alone, has freedom of choice as to use of his copy,—the mere written record of thought or news, the product of intelligence prepared by him, or for him,—whether by AP or his own reporters.

Others perhaps may purloin his copy in advance of publication by him. The instrumentality selected to prepare his copy may not be loyal to him. It may give access to his copy to others not entitled. Immediately after publication authorized by him, the news may be pirated by his competitor. But in all of these cases, what remedy the law affords him is a question of the law of property rights or of unfair competition, not of Constitutional freedoms protected by the First Amendment.

However, Government may not interfere with his choice concerning the first publication of his copy, or the circumstances of publication, because it is against such action that the First Amendment was intended to protect.

Therefore communications of news intelligence to a newspaper such as the Chicago Times by citizens, editors, writers and reporters, including AP, while in the copy

stage, are immune from the reach of Government, save in exceptional situations not here present, where doctrines announced by this Court limit the boundaries of the protection afforded by the First Amendment—a matter which will be considered under point IV, pages 44 to 49 of this brief.

We, therefore, submit that the immunity against governmental restraint imposed by the First Amendment begins with the writer no matter where he is and continues until the intelligence which he transcribes upon his copy is distributed to those to whom it is intended to be published. The distribution of AP copy to its members, in accordance with its bylaws, is not a publication of that copy. It is but one step in the transmission of news copy, for the copy has not yet served its purpose. The process is not complete until publication has been made by the member newspapers. If it can be said that AP's distribution of news copy to its member newspapers is a publication, because of its use of communication facilities in distributing news to its members, the same argument could be used to support the contention that if the newspaper's own reporter sends a news story by a public line of communication, such as the telegraph, there is publication.

(c) *The enjoyment of Constitutional freedoms is not dependent upon the instrumentality used. The instrumentality used is clothed with the same freedoms as the one employing it.*

AP is a nonprofit membership corporation organized under the laws of New York. It is "strictly co-operative, paying its expenses by assessments levied upon its members" (R. 2580, 52 F. S. 364). Its purpose, according to its charter, is "the collection and interchange with greater economy and efficiency of information and intelli-

gence for publication in the newspapers" of its members (R. 2580; 52 F. Supp. 364). The co-operative character of AP's news service is further shown by the challenged by-laws (Secs. 4, 6, Art. VIII; R. 79-80) providing that local, spontaneous news shall be communicated by members to AP for dissemination to other members and shall not be communicated by members to nonmembers.

The circumstances that AP is a corporation, a legal entity separate from its members, and that the copy involved technically is that of AP rather than of its members is of no importance. For AP is merely an instrumentality used by its members in collecting the news here and abroad, editing it and distributing its copy to its members for further pruning, editing, revision and publication in their respective newspapers.

Enjoyment of Constitutional freedoms protected by the First Amendment does not depend upon formalities. So one who publishes a newspaper is not confined in his freedom to the publishing of copy written by himself. He may employ reporters and editors to prepare copy for him. He may also employ other instrumentalities for the same purpose. AP is such an instrumentality. It was referred to in *The Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128, as an instrumentality.

The freedoms protected by the First Amendment are freedoms ordinarily exercised by large numbers of people associated for that purpose, in some cases in incorporated form, in others not. This is true also respecting the practice of religion. It is true concerning the right of assembly and the right of petition. And so with the press,—there are associations of many individuals, either in incorporated or unincorporated form, who print, publish and distribute one or many newspapers, and these organizations avail themselves of other instrumentalities to collect, edit

and communicate the news, and distribute copies of newspapers after publication.

We, therefore, submit that freedom of the press includes the freedom to choose the instrumentalities to be employed in the publication and distribution of a newspaper and freedom to choose those with whom one will associate in those activities, without governmental interference or regulation by reason of the particular instrumentality employed. And the instrumentality employed is clothed with the same freedoms as the newspaper publisher.

From the beginning, the scope of the powers of Government under the Constitution has not been thought to depend upon the nature of the means or instrumentality by which those powers are exercised. So, when the propriety of the exercise of Federal power by means of a corporation organized by it was challenged, as beyond its capacity, this Court upheld its right of choice of the means or instrumentality which it might employ in the exercise of its Constitutional powers.

Chief Justice Marshall, for the Court, in *McCulloch* v. *Maryland*, 4 Wheat, 316, 408, said on this subject: "The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means." He then said that where the means to exercise a power are not stated in the Constitution, nor expressly prohibited, the powers given "imply the ordinary means of execution", and that "the government has its choice of means" (4 Wheat. 409). The Chief Justice continued with the statement: "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means;

and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception" (4 Wheat. 409-410).

Ever since *McCulloch v. Maryland* * it has been clear that the limits of the power of the National Government do not depend upon the means which it employs in exerting its power.

In *Graves v. New York*, 306 U. S. 466, 477, following *McCulloch v. Maryland*, it was held that "when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments."

It is upon the basis of those authorities and others of like import that Congress has authorized corporations to be organized to execute powers granted to it by the Constitution. And the courts consistently have held that such corporations enjoy the same immunities and privileges as the National Government itself, except as Congress in the authorizing Act has otherwise declared.

We submit that it is equally true that the scope of the freedoms of the Constitution does not depend upon the nature of the instrumentalities which may be employed in the enjoyment of those freedoms, and that the instrumentalities so employed are clothed with the same freedoms and immunities as the one who employs them. And this

* In *Osborn v. United States Bank*, 9 Wheat. 738, an endeavor was made to have the Court confine the immunity from State taxation and restrictions implied in the Constitution in favor of Federal instrumentalities to public officers of the Federal Government, not including other Federal agencies or instrumentalities. The endeavor failed. (See 9 Wheat. 866.)

is particularly true in the case of the First Amendment, which necessarily contemplates group action in the enjoyment of those freedoms with which it is concerned.

(d) *Freedom of the press and of religion are similarly protected by the First Amendment. One is as immune from Governmental interference as the other.*

The analogy between AP and a religious corporation merits the Court's consideration.

A nonprofit membership corporation operated as an instrumentality to assist its members to practice their religion, devoting itself purely to religious activities such as educating ministers, furnishing ministers to conduct religious rites and expound to the congregation the tenets of their faith, would be protected by the First Amendment from control or regulation by Government. No one, we think, would urge that admission to such a corporation could be regulated by Government, or that the privileges of membership therein, so long as they were confined to activities connected with religious faith and worship, could be controlled, regulated or interfered with by Government, consistently with the First Amendment.*

The free man, enjoying the right to think, to write and to publish what he pleases of his own, may associate with other free men enjoying the same right. The freedom of each remains the same. The freedom of their association is the same as the freedom of each member. It is not reduced by their association.

---

* Jefferson thus expressed himself: "'I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines; nor of the religious societies, that the General Government should be invested with the power of effecting any uniformity of time or matter among them.'" (*Jeffersonian Cyclopedia* (1900), page 742, paragraph 7220—to Rev. Samuel Miller, Ford ed., IX, 175 (1808).)

In such a congregation of the press free men may exchange their writings by common consent for their mutual welfare. They may govern their association through bylaws. Their bylaws may set up qualifications for membership. Since they initiated the association they have a right to concern themselves about their ability to continue in control of it against strangers, who otherwise might enter in such large numbers as to form a majority and imperil the original intention of those who founded the association.

Religious organizations function in this manner. They have standards of membership which are expressed in many cases in bylaws.

We submit that membership in AP and the news service which it carries are as immune from regulation, interference or control by Government as membership and the privileges which membership affords in religious organizations, so long as AP membership and its privileges are confined to news service activities preceding publication.

The First Amendment protects freedom of religion and freedom of the press alike.* The First Amendment makes no distinction between and protects alike the publisher of the small country town weekly newspaper, the publisher of the large metropolitan daily, the publisher of the single newspaper and the publisher of a chain of newspapers. And it also protects AP in its capacity as an instrumentality of its member newspapers. In protecting freedom of religion it protects the humble individual, a member of a small sect practicing a religious faith disliked by the majority of the citizens of the country, and it protects in the same manner the large and powerful religious corporation will millions of members.

* * * *

---

* See Footnote at pages 13 and 14 of this brief.

Freedom of speech and of the press are not absolute however, and it is therefore necessary to appraise the means employed by government in limiting their scope and the objective sought to be achieved by the limitation. In this case the full scope of freedom of the press is sought to be limited by the exercise of the Commerce power of Congress. And the abridgment here involved is asserted to be motivated by considerations of the public interest. It is, therefore, appropriate for us to examine into those questions, and we shall do so under subsequent headings of this brief.

II.

The Commerce Clause does not justify the abridgment of freedom of the press here involved.

The problem in this case is not solved by a statement that the press is engaged in interstate commerce and is therefore subject to regulation under the Commerce Clause. The fear of abridgment of the personal freedoms, including the freedom of the press, through the exercise of Federal power under the Commerce Clause, led to the adoption of the First Amendment. We shall briefly outline history upon this subject. Then we shall refer to the recognition which this Court has given to the broad scope of protection afforded by the First Amendment. History and the decisions of this Court lead to the conclusion that in the circumstances of this case any conflict between legislation by Congress under the Commerce Clause and a freedom protected by the First Amendment should be resolved in favor of the freedom.

(a) *The history of the relationship between the Commerce Clause and the First Amendment.*

No adequate discussion of the intimate historical relationship between the power of government over concerns

of commerce and the efforts of this nation to achieve effective protection for individual rights can be compressed into a brief of tolerable length. Our discussion of this relationship is therefore a bare summary intended to sketch in outline rather than to depict in detail an historical relationship which we believe to be significant in this case.

The characteristics of the Commerce Clause which we shall discuss on pages 28 to 30 show that congressional power to be an extremely efficient tool of government. Indeed, the very efficiency of the tool to execute in precise detail and degree the legislative will increases the danger involved in sublimation of that power of Government at the expense of the First Amendment.

Fear that exaltation of the power of government over concerns of commerce might subordinate individual rights is not new to us as a nation. That fear was a vital influence in the adoption of the Bill of Rights. Only a few of the powers of the Federal Government were thought of as likely to endanger individual liberties—the taxing power, the commerce power and the war power. And in the minds of those who insisted upon a Bill of Rights as a condition to ratification of the Constitution, fear of the commerce power was perhaps foremost.

This fear was natural. The effort to subject the Colonies to taxation to obtain revenue under the pretense of regulating commerce was responsible for the Revolutionary War.[1]

The unsatisfactory state of commerce under the Confederation resulted in the meeting of Commissioners from five states at Annapolis to consider the trade of the states.

---

[1] Lecky, England in the 18th Century, III, 302; Marshall, Life of Washington II, 105; Writings of Washington, Vol. 3, pp. 223, 224; *Gibbons* v. *Ogden*, 9 Wheat. 1, 202.

And from that meeting stemmed the Convention and the Constitution.

But the new government was not launched without a bitter struggle and then only by a narrow margin. Fear of the abuse of the commerce power spearheaded the opposition to ratification. Though Roger Sherman said in Connecticut: "The liberty of the press not being the regulation of Congress will be in no danger"*, "Centinel" and other opponents in Pennsylvania charged that the "gilded bait" of Congressional control of commerce concealed "corrosives" capable of eating the substance of freedom.† James Wilson answered this and other opposition by the statement that the "proposed system possesses no influence whatever upon the press."‡ George Washington indorsed Wilson's viewpoint.**

It was thought that because of the Commerce Clause liberty was being sacrificed for efficiency. And when the Constitution was ratified, it was with a distinct understanding that amendments spelling full protection for individual freedom would be adopted at once.††

The first inaugural address of Washington recognized the popular "inquietude" for amendments and left to the deliberation of Congress how far the "characteristic rights of free men" could be "impregnably fortified."°

---

* Life of Roger Sherman, Boutell, 173.

† McMaster & Stone, Pennsylvania and the Federal Constitution, 616.

‡ McMaster & Stone, Pennsylvania and the Federal Constitution, 143, 144; also Elliot's Debates, Vol. II, p. 449.

** Writings of Washington, Vol. 29, 475 at 478-79.

†† Writings of Washington, Vol. 29, 336 at 340; 395 at 396; 409 at 411; 464 at 465, 466; 475 at 478; Elliot's Debates, Vol. III, p. 656; Jeffersonian Cyclopedia (1900) p. 188, par. 1649; Jeffersonian Cyclopedia (1900) p. 188, par. 1651.

° Richardson, Messages and Papers of the Presidents (1789-1817), I, 53.

There is no chapter in history so rich in episodes in a people's experience with oppression which has been followed by related events and actions proving their intention to prevent the recurrence of that experience.

The experience was with the abuse of commerce power as a destroyer of human liberties.

The intention, in the Constitution, was to safeguard human liberties against a repetition of that abuse; and, in the Bill of Rights, impregnably to fortify those liberties by putting into written form safeguards which previously had been understood, but left unwritten.

In this case there is a conflict between the power of Congress under the Commerce Clause and the personal freedoms which were sought to be protected against that very power by the Bill of Rights. History, almost alone, decides such a conflict.

(b) *Under the opinions of this Court, legislation enacted by Congress, including legislation enacted under the Commerce Clause, must yield to the provisions of the First Amendment.*

In recent years this Court on many occasions has dealt with freedoms protected by the First Amendment directly, or protected by the Fourteenth Amendment through the First Amendment. In *Bridges* v. *California*, 314 U. S. 252, 263, the Court said:

> "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Chief Justice Stone, dissenting in *Jones* v. *Opelika*, 316 U. S. 584, 609, said: "The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws."

Therefore, laws regulating commerce are like other laws. They enjoy no special immunity from the command of the First Amendment. The First Amendment is a direct restraint upon all of the powers of the Federal Government. The interstate and commercial character of the press simply poses the paramount problem of this case; it does not solve it.

In the two most closely related cases involving legislation passed by Congress under the commerce power and the First Amendment this Court has made it clear that the legislation must meet the test of the First Amendment.

In *Associated Press* v. *Labor Board*, 301 U. S. 103, 133, the Court said: "The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published." Here the full freedom and liberty of the producer of news copy to publish it as he desires it published is abridged. For that full freedom and liberty does not exist where government commands the delivery of unpublished news copy to others for publication as they choose, against the will of the producer.

In *National Broadcasting Co.* v. *United States*, 319 U. S. 190, regulation of the commercial aspects of radio which abridged the full freedom of the First Amendment were sustained because of the physical limitations of the radio spectrum. "Unlike other modes of expression radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." (319 U. S. 226.) The press is undeniably a mode of expression which is "inherently available to all"; it lacks the characteristics which has made radio, unlike other modes of expression, subject to governmental regulation.

(c) *A commercial press is protected by the First Amendment.*

The fact that "the press," as involved in this case, is commercial—that newspaper publishing is a business—neither expands the scope of the Commerce Clause nor contracts the area of the Constitutional freedom protected by the First Amendment. A commercial press, a press whose product is sold, a press conducted for profit, is the very kind of press that the framers of the First Amendment knew and were talking about. Critical publications within their ken were Thomas Paine's pamphlets, "Common Sense" and "The Crisis." And these pamphlets were sold.* The flat prohibition of the exercise of Congressional power to abridge freedom of the press was formulated by men who had before them vital examples of the power of a commercial press.

Full freedom of speech does not depend upon the economic disinterestedness of the speaker. The picketing cases from *Thornhill* v. *Alabama*, 310 U. S. 88, 104, to *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, 296, demonstrate that. And we submit that the full freedom of a writer to determine what to publish, and where and when to publish and distribute it, is not to be limited because his determination is influenced by economic considerations.

The picketing cases also have recognized that the power of government over economic affairs may not be so exercised as to narrow the scope of full freedom of speech. "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ

---

* Life of Thomas Paine, Vol. XV Dictionary of National Biography (1922), pp. 70-72; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111.

of the state. A state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." (*A. F. of L.* v. *Swing*, 312 U. S. 321, 325-326.) And the scope of freedom of the press is not diminished by legislative or judicial notions as to the appropriate economic atmosphere for interstate commerce.

(d) *Congressional objectives and methods in regulating commerce under the Commerce Clause are transitory. They afford no basis for expanding or contracting the area of the Constitutional freedom protected by the First Amendment.*

Flexibility is the outstanding characteristic of regulation under the Commerce Clause. In its exercise of the commerce power, Congress may determine the objective, the intensity and the method of its regulation. And its selection of one objective or one method of regulation today is no deterrent to its selection of another objective or another method tomorrow.

As Congressional appraisal of national needs has responded to its changing interpretations of the requirements of public welfare, the freely competitive conditions prescribed for railroads, for example, by the anti-trust acts, have yielded to another scheme of regulation in the Transportation Act of 1920. (*New York Central Securities Corporation* v. *United States*, 287 U. S. 12, 25.) The activities which in *Swift and Company* v. *United States*, 196 U. S. 375, were regulated under the anti-trust laws to achieve free competitive conditions, were later, under the Packers and Stockyards Act of 1921, regulated by an act which, this Court said, "treats the various stockyards of the country as great national public utilities • • •." (*Stafford*

v. *Wallace*, 258 U. S. 495, 516, 520.) The same notion of the flexibility of Congressional power under the Commerce Clause was expressed in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 396, in the sentence "Certainly what Congress has forbidden by the Sherman Act it can modify."

Not only is there Congressional choice as to objective under the Commerce Clause—here the achievement of a desired economic atmosphere. There is choice also of methods. Substantially what is here attempted was accomplished in the field of radio. (*National Broadcasting Co.* v. *United States*, 319 U. S. 190.) Here the method is judicial restraint under the anti-trust laws; there the method was governmental licensing.

But in terms of actual result it seems immaterial whether the control which the Government seeks to achieve over the assembling of news copy is exercised by administrative license or by judicial license. And what the Government seeks is the equivalent of a judicial license.

The Government asserts error in this Court because:

"3. The Court erred in refusing to enter a final judgment enjoining the defendants, and each of them, from promulgating, agreeing to observe and observing, any new or amended by-laws of The Associated Press authorizing denial of membership in The Associated Press for any reason other than (1) that the applicant is not the sole owner of a bona fide newspaper published in the United States, (2) that the applicant has not assented in writing to the lawful by-laws of The Associated Press, or (3) that the applicant has not paid to The Associated Press any money contribution which its by-laws may require new members to pay and which is based upon the new member's equitable proportion of the value of the net tangible assets of The Associated Press and is applicable irrespective of

whether the new member's newspaper is or is not published in the same city and 'field' (morning, evening or Sunday) as the newspaper of an existing member." (R. 2667.)

In other words, says the Government, the trial court improperly determined the conditions of the license under which newspapers are to be permitted to associate in a co-operative news gathering effort.

It can scarcely be doubted that if, under the Commerce Clause, Congressional authority limiting the scope of freedom of the press can be asserted under anti-trust statutes, it can equally be asserted under a licensing statute having for its object the regulation of interstate commerce. And governmental licensing of the press has notorious historical connotations. (*Near* v. *Minnesota*, 283 U. S. 697, 713, 718; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245, 249.)

In determining the adequacy of legislation enacted under the Commerce Clause as a justification for the abridgment of full freedom in this case it is necessary, we submit, to consider the flexibility of Congressional power under the Commerce Clause; the responsiveness of Congress to transitory objectives, and the fact that once the First Amendment has failed to prevent Congressional abridgment by one method and in pursuit of one objective, a shift in Congressional method or objective to another form of abridgment can hardly be prevented by that Amendment. It is necessary also to consider whether a Bill of Rights which guards the individual's freedom to publish what he will, when he will and where he will, has left it open to government, under the Commerce Clause, to prescribe terms upon which he may be compelled to deliver his unpublished copy for use by others against his will. And this in the absence of any specific declaration of legislative policy, and in support of an economic policy which is temporary and perhaps fleeting.

III.

Neither Congress nor the Courts may substitute their judgment concerning the method by which the public interest is best served for the provisions of the First Amendment on that subject. The method provided by the First Amendment is freedom from governmental authority. The method urged by the Government and adopted by the Court below is compulsory sharing of copy, which is incompatible with that freedom.

(a) *Government has always asserted that the restraints which it sought to impose upon the press have been in the public interest.*

If history is a guide, every abridgment of freedom of speech, press and religion will be asserted in the public interest. Suppression for suppression's sake, abridgment for abridgment's sake, are hardly to be feared. Certainly the "Decree of Starre Chamber" which Milton pilloried for all time was based upon alleged considerations of the public interest. Uncensored printing was said to have operated "to the prejudice of the publike", and "to the disturbance of the Peace of the Church and State"; it was therefore to be licensed in the public interest.* And the Order of Parliament of June 14, 1643, at which "Areopagitica" was immediately aimed, was "An Order of the Lords and Commons assembled in Parliament, For the Regulating of Printing, and for suppressing the great late abuses and frequent disorders in Printing many false, Scandalous, Seditious, Libellous and unlicensed Pamphlets, to the great defamation of Religion and Government."†

---

*English Reprints "Areopagitica", Alex. Murray & Son, London (1869), p. 8.

†English Reprints "Areopagitica", Alex. Murray & Son, London (1869), p. 25.

Nor has the method of attack changed since Milton's day. *Near* v. *Minnesota*, 283 U. S. 697, involved a statute which labeled the offending newspaper as a "public nuisance". *Hague* v. *C. I. O.*, 307 U. S. 496, brought the First Amendment, through the Fourteenth Amendment, into conflict with an ostensible effort to avoid public disorder. In each of the recent Jehovah's Witness cases claims of public interest—from unlittered streets to unbroken heads—were presented. (*Lovell* v. *City of Griffin*, 303 U. S. 444; *Martin* v. *Struthers*, 319 U. S. 141.) The legislative and judicial policies involved in the picketing cases from *Thornhill* v. *Alabama*, 310 U. S. 88, to *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, undeniably expressed appraisals of the public welfare relating to the conduct of labor disputes.

That every attempt to compress the scope of the First Amendment will be made under the guise of "the public interest" was pointed out by Mr. Justice Stone, dissenting in *Minersville School District* v. *Gobitis*, 310 U. S. at 604, 605.

(b) *Governmental endeavor to achieve unity of opinion by regulation of the press is not a legitimate objective. It is opposed to the First Amendment.*

It seems unlikely, then, that the First Amendment can be read out of this case merely because the Government seeks to regulate the press in the public interest. The characteristics of the asserted public interest must still be scrutinized in the light of the flat prohibition of the First Amendment. These characteristics may best be determined by an analysis of the allegations of the Government's complaint.

The public interest alleged by the Government to support abridgment of full freedom of the press is the public interest in "the widest possible dissemination among the

American people of fresh, accurate, and world-wide news of current events and conditions, through the instrumentality of newspapers * * *." (Complaint, Par. 42, R. 7-8.) It is alleged:

"42. Newspapers supply a necessity and their business vitally affects the national interest. Public opinion largely motivates and determines both public policies and private actions in a democracy like the United States. Such opinion tends to be unified, and wisely and effectively exerted in the national interest, in proportion to the extent that it is based upon current, accurate and complete information of those events and conditions throughout the world which are materially related to the concerns of this nation and its people. The extent of such information has increased with the growth in number, range and complexity of public issues and with their increasing interdependence upon conditions and happenings throughout the United States and other parts of the world. Recent events culminating in the present world-wide conflict have greatly accentuated the need for this type of information. Newspapers are the chief media for its dissemination. Many private actions of the people of the United States are likewise determined by newspaper reports of day-to-day events. Many business transactions are conducted in reliance upon such reports. The widest possible dissemination among the American people of fresh, accurate, and world-wide news of current events and conditions, through the instrumentality of newspapers, is therefore of vital importance to the national welfare."

To a lay reader the first sentence of this paragraph of the complaint might seem to state, in language innocent, though dubiously sweeping, what seems fairly obvious. But to a lawyer its implications are more penetrating. The language is a capsule compression of the formula which inevitably has led to governmental regulation as a

public utility. It is fairly axiomatic in our law that the producer or distributor of a "necessity" whose business "vitally affects the national interest" is subject to governmental regulation, if government sees fit to regulate.

The second sentence states a truism. It is significant only in so far as a manifestation of governmental concern with the process of the formulation of public opinion is surprising in view of the First Amendment. "There is no mysticism in the American concept of the state or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." (*Board of Education* v. *Barnette*, 319 U. S. 624, 641.)

The third sentence seems to suggest the desirability of a unified public opinion.

The basic theory of the Government's case emerges from these three sentences of the complaint. A unified public opinion is asserted as a goal properly to be achieved by the affirmative exercise of the power of government. And newspapers, because they can effectively participate in the formulation of a unified public opinion are alleged to possess characteristics which spell affirmative regulation by government as public utilities.

Unity achieved by compulsion has been depreciated as a governmental objective since the complaint was filed in this case. "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement. Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men.

Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. * * * Those who begin by coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." (*Board of Education* v. *Barnette*, 319 U. S. 624, 640-641.)

If the slate were clean, the wisdom of a governmental policy of regulation of newspapers to achieve a unified public opinion might, we suppose, be arguable. But the slate is not clean. Such a policy is exactly opposed to the language and the spirit of the First Amendment. No changed conditions are advanced to support the fundamental change suggested between the relations of government and press. The allegations of the complaint, relied upon by the Government to establish a public interest in newspapers which warrants governmental regulation, were just as true when the First Amendment was adopted as they are today. They apply verbatim to the period of the adoption of the Bill of Rights. The identical circumstances which then gave birth to the command that Congress shall make no law abridging the freedom of the press are now relied upon to support regulation by government.

(c) *The view of the court below that the public interest in "full illumination" through newspapers will be best served by regulation of membership in AP is as obnoxious to the First Amendment as the other reasons which have been advanced in the past to achieve abridgment of the freedom of the press.*

Of course, freedom of speech and of the press were not established solely for the personal gratification and development of the speaker or writer. These freedoms were

established to protect and foster the dignity of man; to permit the individual to achieve the full stature of manhood free of restraints upon liberty of discussion or the press imposed by Government, and also to benefit the public by the free expression of information and opinion. (Brandeis, J., concurring in *Whitney* v. *California*, 274 U. S. 357, 375; Address by Delegates of the First Continental Congress to the inhabitants of Quebec, Journals of the Continental Congress, Vol. 1, pp. 40, 42.)

The prevailing opinion in the District Court considers the public interest in "the dissemination of news from as many different sources, and with as many different facets and colors as is possible." (R. 2595; 52 F. Supp. 372.) In determining the scope of the anti-trust laws, the Court examines the restraint imposed by the by-laws of AP in terms of their effect upon the public. Conceiving that the public interest in the dissemination of news is "closely akin to, if indeed it is not the same as, the interest protected by the First Amendment," the Court holds that a restraint which might be unobjectionable in an ordinary case is here prohibited by the anti-trust laws, because the press is involved. (R. 2595; 52 F. Supp. at 372.)

The framers of the First Amendment looked at this same public interest which the trial court considers; they appraised its importance; they weighed it directly in terms of all governmental power and all governmental objectives, and from their appraisal emerged the command against governmental abridgment. And now this public interest,—the same today as it was in 1789,—is appraised again. This time it is appraised by a court, not directly, but in the application of a formula devised to limit by construction the sweeping language of a statute. And the Court determines that this same public interest in the dissemination of news—which gave birth to the flat prohibition of the First Amendment against the exercise of

governmental power—now justifies an exertion of that power.

The First Amendment was not designed to accomplish an ideal protection. The framers of the First Amendment were not naive. They were the keenest group of students of government that the world has ever known. They knew that evils were inherent in a free press; but they saw also that greater evils were inherent in a press regulated by government and they deliberately chose the evils that would accompany freedom.* That sound determination, made by the adoption of the First Amendment, that the

---

* Jefferson, as Secretary of State in 1793, received from the Spanish Commissioners a complaint about attacks in the American press upon the King of Spain. He replied to the Commissioners: "Considering the great importance to the public liberty of the freedom of the press, and the difficulty of submitting it to very precise rules, the laws have thought it less mischievous to give greater scope to its freedom than to the restraint of it. The President has, therefore, no authority to prevent publications of the nature of those you complain of." (Jeffersonian Cyclopedia (1900), p. 636, Par. 5944.)

Later, in the Kentucky Resolutions of 1798, Jefferson referred to the circumstance that no power over freedom of religion, freedom of speech, or freedom of the press was delegated to the United States by the Constitution, and continued with this statement: "* * * thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech, and of the press, may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed." (Jefferson Cyclopedia (1900), p. 977.)

In the communication from John Marshall, Charles Pinckney and Elbridge Gerry, ministers plenipotentiary and envoys extraordinary from the United States to France, sent in 1798 to Citizen Minister Talleyrand, who had complained against a speech by the President and certain publications appearing in the newspapers of the United States, they said:

public interest required immunity of the press from regulation by government, thus was placed beyond the authority of court or legislature to modify or revise.

The court below advances in support of its new appraisal of the requirements of the public interest as they relate to freedom of the press the notion of the ultimate desirability of "full illumination" of the public through newspapers. The apology for every governmental abridgment of freedom of the press seems to have been the desirability of "illumination" of the public. The difference is in the kind of illumination sought. "Accurate illumination" at one time was the goal.* "Safe illumina-

---

"The genius of the constitution, and the opinions of the people of the United States, cannot be overruled by those who administer the Government.

"Among those principles deemed sacred in America; among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence, and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press.

"That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps, it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn.

"However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America." (American State Papers, Class I, Foreign Relations, Vol. II, p. 196.)

* Proclamation of King Charles II. The entire Proclamation is as follows:

"For Suppressing the Printing and Publishing Unlicensed News-Books, and Pamphlets of News.

"CHARLES R.

"Whereas it is of great Importance to the State, That all News Printed and Published to the People, as well con-

tion" was the goal of the Court of Starre Chamber which referred to publications to the prejudice of the public and to the disturbance of the peace of church and state. (English Reprints "Areopagitica", Alex. Murray & Son, London (1869) p. 8.) "Wholesome illumination" was the goal for the Minnesota statute involved in *Near* v. *Minnesota*, 283 U. S. 697.

All of these qualifications of illumination are contradictions of the First Amendment. That Amendment visualized freedom of publishers to illuminate the public, and if that freedom to illuminate lacks entire consistency with full or safe or wholesome or accurate illumination, they

---

cerning Foreign, as Domestick Affairs, should be agreeable to Truth, or at least Warranted by good Intelligence, that the minds of His Majesties Subjects may not be disturbed, or amused by Lies or vain Reports, which are many times raised on purpose to Scandalize the Government, or for other indirect Ends; And whereas of late many Evil-disposed Persons have made it a common Practice to print and Publish Pamphlets of News, without License or Authority, and therein have vended to His Majesties People, all the idle and malicious Reports that they could Collect or Invent, contrary to Law; The continuance whereof would in a short time endanger the Peace of the Kingdom, the same manifestly tending thereto, as has been declared by all His Majesties Judges unanimously: His Majesty therefore considering the great Mischief that may ensue upon such Licencious and Illegal Practices, if not timely prevented, hath thought fit by this His Royal Proclamation (with the Advice of His Privy Council) strictly to Prohibit and Forbid all Persons whatsoever to Print or Publish any News-Books, or Pamphlets of News not Licensed by His Majesties Authority. And to the intent all Offenders may know their Danger, and desist from any further Proceedings of this kind, His Majesty is Graciously pleased hereby to Declare, That they shall be proceeded against according to the utmost Severity of the Law: And for that purpose, His Majesty doth hereby Will and Command all his Judges, Justices of Peace, and all other His Officers and Ministers of Justice whatsoever, That they take effectual Care, that all such as shall Offend

must be sacrificed. That was the choice made, and made knowingly, in the First Amendment.

As we have pointed out, the public interest in full illumination by the press comes into this case indirectly in the process of application of the anti-trust laws. If this public interest were asserted directly by a federal statute which licensed newspapers, the conflict between the public interest asserted by the trial court and the public interest as expressed in the First Amendment would be apparent and the fate of the statute would be predictable. The First Amendment is unambiguous; it is a restraint upon government; it does not grant power to any branch of government, legislative, executive or judicial. The Amendment cannot be converted into a grant of power because the policy supporting the conversion is announced by a court applying a statute enacted by Congress instead of being announced directly by Congress.

(d) *The events of the day constitute the news. News copy is an unpublished story of those events. One is the event, the other the story. Freedom of the press does not require unhampered access to news copy. Such access to the news copy of another is opposed to the First Amendment.*

The allegations of the complaint concerning "the national policy in favor of freedom of the press" also re-

---

in the Premises, be proceeded against, and punished according to their Demerits.

"Given at Our Court at Whitehall this 12th day of May, in the Two and Thirtieth year of our Reign.

"God Save the King.

"London, Printed by John Bill, Thomas Newcomb, and Henry Hills, Printers to the Kings most Excellent Majesty, 1680." (Original in the John Carter Brown Library, Brown University, Providence, R. I.)

quire analysis. It is alleged (Complaint Par. 43, R. 8):

"43. The national policy in favor of freedom of the press requires that newspapers engaged in disseminating news be unhampered and unrestrained in selecting the particular news they choose to publish, in emphasizing it, and in expressing any accompanying viewpoint or opinion. A corollary of such national policy is that newspapers be unhampered by any artificial or unnecessary restraints, public or private, upon their choice of, and free competitive access to, the various sources of news, including agencies engaged in assembling and transmitting daily news reports of world events."

In the context of the Government's case it is clear that "news" means not the event itself, but the story of the event—which is "news copy." It is unnecessary for us to quarrel with a statement that freedom of the press includes unhampered access to "news", in the sense of events having news value. But when it is suggested that freedom of the press includes unhampered access to "news copy," which is not the event, but another man's story of the event, written but not yet published, serious questions arise.

Events themselves are not copy. The reporter of events writes the history of the day in copy. The reporter searches among events to determine which are worthy of copy. His selection of events involves judgment and opinion as to their importance in relation to other events in the day's history. Having selected the events worthy of his writing, he again uses judgment and opinion as to the relative importance of facts about each of those events. This is not an automatic process by robots. Men and women have put their lives and ambitions, their knowledge and special skills and faculties into the writing of

this history which they hold in their hands for only brief hours as they produce the written copy.*

The Government's casual merger of an occurrence with what is written about that occurrence effects a drastic revision of freedom of the press. Heretofore freedom of the press has not been regarded as inconsistent with the recognition of a producer's freedom to determine the circumstances of publication of his news copy. But if government may compel unhampered access to the news copy of others with the right to publish, upon the theory that such access favors freedom of the press, the producer of news copy has lost his freedom to determine if and when and where and to whom his story will be published and distributed. Thus his freedom to publish has been abridged by government, because publication of his copy may be achieved without his consent and against his will.

Actually, the right to determine the circumstances of publication of one's copy, far from being an encroachment upon freedom of the press, is a part of that freedom.

---

* The trial court seems to have appreciated the difference between the news event and the story of the news event. The court said: (52 F. Supp. 372, R. 2595):

> "News is history; recent history, it is true, but veritable history, nevertheless; and history is not total recall, but a deliberate pruning of, and calling (culling) from, the flux of events. Were it possible by some magic telepathy to reproduce an occasion in all its particularity, all reproductions would be interchangeable; the public could have no choice, provided that the process should be mechanically perfect. But there is no such magic; and if there were, its result would be immeasurably wearisome, and utterly fatuous. In the production of news every step involves the conscious intervention of some news gatherer, and two accounts of the same event will never be the same. Those who make up the first record—the reporters on the spot—are themselves seldom first hand wit-

That it has received recognition also as a right of property does not deprive it of its status as a part of freedom of the press.

The framers of the Constitution and of the First Amendment did not see any inconsistency between the personal freedom of an author to determine whether to publish or not and the existence of property rights in his literary composition. On the contrary, they recognized property rights in literary compositions by empowering Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (Constitution, Article I, Sec. 8, cl. 8).

And by the First Amendment they afforded protection against abridgment by Government of the personal freedom to publish the copy which one has produced.

The national policy of the Constitution prescribes for the press an area of freedom from regulation by Government. The novel notion expressed by the Government in Paragraph 43 of the complaint (R. 8) of a "national

---

nesses; they must take the stories of others as their raw material, checking their veracity, eliminating their irrelevancies, finally producing an ordered version which will evoke and retain the reader's attention and convince him of its truth. And the report so prepared, when sent to his superiors, they in turn 'edit', before they send it out to the members; a process similar to the first. A personal impress is inevitable at every stage; it gives its value to the dispatch, which without it would be unreadable. So much for those items which actually appear in all the larger news services, and which include all events of major interest. But these are not all: the same personal choice which must figure in preparing a dispatch, operates in deciding what events are important enough to appear at all; and about that, men will differ widely; as we often find, when one service 'carries' what others have thought too trivial; or may indeed have missed altogether."

policy in favor of freedom of the press" by unhampered and unrestrained access to news (news copy) is an abridgment of the national policy as expressed in the First Amendment. For it abridges the freedom of the producer of news copy to determine whether it shall be published or not, and, if published, the circumstances of its first publication.

IV.

Compulsory sharing of news copy, the equivalent of compulsory utterance, is not warranted in this case under any rule announced by this Court limiting the freedoms protected by the First Amendment.

Should regulation under the Commerce Clause to achieve a competitive atmosphere succeed in supplanting the atmosphere of freedom for the press intended to be secured by the First Amendment, the worst fears of those who opposed ratification of the Constitution because the Commerce Clause might be utilized to abridge human freedoms will have been realized.*

This Court has recognized that the techniques employed in determining the validity of ordinary legislation do not suffice when the challenge is based upon the First Amendment. There is no room for deference to legislative judgment or presumptions in favor of validity when legislation confronts the flat restraints of the First Amendment.

In *Board of Education* v. *Barnette*, 319 U. S. 624, 639, the Court said:

> "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much

---

* See pages 23 to 25 of this brief.

> of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

Schneider v. *State*, 308 U. S. 147, 161, is to the same effect.

State legislation, then, faces the test of the First Amendment shorn of the benefits of presumption. Where national legislation is involved the necessity for searching scrutiny of the challenged regulation is, if anything, more readily apparent, for here the command of the Constitution is direct; there is no room for possible insulation which might have been thought to result from transmission through the general language of the 14th Amendment. (Mr. Justice Holmes dissenting in *Gitlow* v. *New York*, 268 U. S. 652, 672.)

Recognition that more than ordinary justification is demanded of legislation challenged by the First Amendment has resulted in the evolution of the "clear and present danger" test. Not all legislative goals can be accomplished; if accomplishment means abridgment, the legislative method and its ultimate objective must be carefully weighed, and if either method or objective is found wanting the governmental objective can not be achieved. The role of the "clear and present danger" test and its

operation were thus described in *Bridges* v. *California*, 314 U. S. 252, 263:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be very serious and the degree of imminence very high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Restrictions have been imposed upon the government's choice of method in accomplishing its purposes when fundamental liberties are involved, even if the restrictions spell failure of accomplishment of governmental objectives which are unimpeachable save as they trespass upon the constitutionally restricted area.

Mr. Justice Stone, dissenting in *Minersville School District* v. *Gobitis*, 310 U. S. 586, after pointing out the legitimate character of the concerns of government involved in *Pierce* v. *Society of Sisters*, 268 U. S. 510, *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, and *Schneider* v. *State*, 308 U. S. 147, said (p. 603):

> "In these cases it was pointed out that where there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both and that it is the function of courts to determine whether such accommodation is reasonably possible. In the cases just mentioned the Court was of opinion that there were ways enough to secure

the legitimate state end without infringing the asserted immunity, or that the inconvenience caused by the inability to secure that end satisfactorily through other means, did not outweigh freedom of speech or religion."

If the clear and present danger test is applied here, it seems obvious that no sufficient justification exists for abridgment of full freedom of the press.

The findings and conclusions of the trial court negative any threat of monopoly. The court has found:

"IX. AP does not monopolize or dominate the furnishing of news reports, news pictures, or features to newspapers in the United States.

X. AP does not monopolize or dominate access to the original sources of news.

XI. AP does not monopolize or dominate transmission facilities for the gathering or distribution of news reports, news pictures, or features." (R. 2629.)

The trial court also has found, both in general terms and by reference to specific instances, that access to the copy of AP members is not necessary to successful publication of a newspaper. (Findings 71-82, R. 2616-2618). These findings unmistakably demonstrate that factors other than AP membership determine the success achieved by any particular newspaper.

If the assertion of the public interest in wide dissemination of news "from as many different sources and with as many different facets and colors as possible," is accepted for the moment as a warrant for the exercise of governmental power over the press, the seriousness of the danger to that public interest must still be weighed in applying the clear and present danger test.

The phase of freedom of the press which is involved in this case, protection from the compulsory utterance or the compulsory sharing of news copy, continues only until

publication. After a news story has been once published, under circumstances freely determined by its producer, this phase of Constitutional protection has been satisfied. *So far as the First Amendment is concerned, there need be no delay whatsoever after the original publication before other newspapers can, without raising any question of freedom of the press, publish what they will.* There may be, under existing law, an invasion of the judicially declared quasi-property right in news copy heretofore referred to, but that is of no importance so far as the First Amendment is concerned.

Under such circumstances, it is difficult to see how it can be realistically asserted that there is any danger, serious or otherwise, to the full illumination of the public, if publication of an AP news story by one not a member is delayed until it has been published by a member newspaper.

There is here no imminent danger of monopoly; there is here no imminent danger to the survival of newspapers which are not members of AP. There is, in the circumstances of this case, no genuine danger, imminent or otherwise, to any legitimate concern of Government.

* * * * *

The "clear and present danger" test has been considered in most, if not in all, of the First Amendment cases in this Court. Recent cases have suggested the possibility that freedom of speech, press and religion are limited at the point where they collide with the rights of other individuals. *Carpenters Union* v. *Ritter's Cafe*, 315 U. S. 722, 728; *Board of Education* v. *Barnette*, 319 U. S. 624, 630.

Insofar as the boundary of freedom of the press coincides with the point at which exercise of full Constitutional freedom involves a trespass upon the rights of others, that boundary is not approached in the present

case. When The Chicago Times determines what to publish, where to publish and when to publish and what it will do with its news copy prior to publication, its decision does not interfere with the right of any other newspaper to make the same decisions as to its own copy.

The Chicago Times as an AP member does not prevent any person from writing what he pleases on any subject, or from publishing what he writes. Freemen may communicate at will, or they may remain passive and stand mute. Refusal to deliver one's ideas, thoughts, information or opinions, either by spoken syllables, symbols or written words, on any subject, including the day's history, does not interfere with the right of any one else.

Certainly no one is entitled to news copy prior to publication by its producer. The Sherman Act does not purport to grant any such right of access. The right of access which is sought to be accomplished by the lower court's decision is judicially created to accomplish the court's conception of what the Sherman Act requires in order that there may be no illegal restraint of commerce. A right created in the process of statutory construction cannot give that statute immunity from the command of the First Amendment. Its creation is inconsistent with the First Amendment.

CONCLUSION.

We respectfully submit that the judgment of the court below should be reversed and the cause be remanded with directions to the court below to dismiss the complaint.

Respectfully submitted,

MATTHIAS CONCANNON,
WALTER V. SCHAEFER,
Chicago, Illinois,
Attorneys for Chicago Times, Inc., Amicus Curiae.